



**Department of Energy
Acquisition Regulation**

No. AL-2003-03

Date: 05/30/03

ACQUISITION LETTER

This Acquisition Letter is issued under the authority of the Procurement Executive of DOE and NNSA

Subject: Implementation of Fiscal Year 2003 Legislative Provisions

References:

DEAR 917.6	Management and Operating Contracts
DEAR 970.1706-1	Award, Renewal, and Extension.

When is this Acquisition Letter (AL) Effective?

This AL implements certain provisions contained in the Consolidated Appropriations Resolution, 2003, Pub. L. 108-7. The Energy and Water Development Appropriations Act, 2003, Pub. L. 108-7 (Division D) and the Department of Interior and Related Agencies Appropriations Act, 2003, Pub. L. 108-7 (Division F) are contained in the Consolidated appropriations. The statutory provisions addressed in this AL are effective on the date of enactment of this Act. The Energy and Water Development Appropriations Act, 2003 and the Department of Interior and Related Agencies Appropriations Act, 2003, were enacted on February 20, 2003.

When Does this AL Expire?

This AL will remain in effect until superseded or canceled.

Who is the Point of Contact?

Contact Denise Wright of the Office of Procurement and Assistance Policy at (202) 586-6217.

Visit our website at www.v.pr.doc.gov for additional information on Acquisition Letters and other policy issues.

What is the Purpose of this Acquisition Letter?

The purpose of this Acquisition Letter (AL) is to provide information and guidance regarding the Department's implementation of the following statutory provisions and legislative direction.

- ◆ Sections 301, 304, 307, 501, and 502 of the FY 2003 Energy and Water Development Appropriations Act, Pub. L. 108-7, hereinafter referred to as the "Energy and Water Act."
- ◆ Sections 301, 302 and an administrative provision contained in the FY 2003 Department of Interior and Related Agencies Appropriations Act, Pub. L. 108-7, hereinafter referred to as the "Interior Act."

Detailed guidance regarding the scope of these provisions is provided below.

What is the Background?

Sections 301, 304, 307, 501, and 502 of Energy and Water Development Act are carried-over from the FY 2002 Energy and Water Development Appropriations Act (Pub. L. 107-66). However, there are significant changes to Section 301.

Sections 301 and 302 of the Interior Act are carried-over from the FY 2002 Department of Interior and Related Agencies Appropriations Act (Pub. L. 107-63). An unnumbered administrative provision, as carried over from previous years, included in this Act is similar to Section 304 of the Energy and Water Act whereby no funds provided in this Act may be expended to prepare, issue, or process procurement documents when appropriations have not been made.

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I. Summaries of Statutory Provisions and Legislative Direction

Ener2y and Water Act

Section 301. Prohibits the use of funds appropriated by this Act for the award of a management and operating (M&O) contract or a contract for environmental remediation or waste management in excess of \$100 million in annual funding at a current or former management and operating contract site or facility, or a significant extension or expansion to an existing M&O contract or other contract covered by this section unless competitive procedures are used. The Secretary of Energy may grant, on a case-by-case basis, a waiver to allow for other than competitive procedures. The Secretary may not delegate the authority to grant a waiver. The requirement parallels existing DOE policy set forth in DEAR 917.602 providing for full and open competition in the award, amendment, or modification of M&O contracts and requiring a justification and Head of Agency authorization when such awards are made without providing for full and open competition. Additionally, in order to comply with Section 301 the Secretary will submit a report within 30 days after the Secretary has authorized such a waiver to provide notification to the Subcommittees on Energy and Water Development of the Committees on Appropriations of the House of Representatives and the Senate detailing the substantive reasons for the waiver authorizing the use of non-competitive procedures¹. *Note: underlined portions are new for FY 2003.*

Section 304. Prohibits the use of funds appropriated in the Energy and Water Act to prepare or initiate Request For Proposals (RFPs) for a program if Congress has not funded the program.

Section 307. Directs the Department of Energy to ensure that broad public notice be given when a user facility is available to universities and other potential users or when the Department of Energy seeks input from universities and other potential users regarding significant characteristics or equipment in a user facility or a proposed user facility.

¹ Section 301, paragraph (b), states: "within 30 days of formally notifying an incumbent contractor that the Secretary intends to grant such a waiver, ..." DOE does not ordinarily provide formal notification to incumbents of the Secretary's intention to grant a waiver under Section 301. In the interest of clarity, the above requirement achieves the obligation of the statutory language, and is consistent with actual practice.

In addition, this provision further requires the Department of Energy to employ "full and open competition"² in selecting a university or other potential users as a formal partner in the establishment or operation of a user facility.

Section 501. Prohibits the use of funds appropriated in the Act, either directly or indirectly, to influence congressional action on any legislation or appropriation matter pending before Congress, other than to communicate to Members of Congress as described in section 1913 of title 18, United States Code.

Section 502. Provides that it is the sense of Congress that, to the greatest extent practicable, all equipment and products purchased with funds appropriated by this Act should be American-made. Additionally, when providing financial assistance to or entering into any contract with any entity notice of this policy shall be given. This section prohibits the award of contracts and subcontracts to persons who falsely label products as made in America. Persons determined by a court or Federal agency to have intentionally affixed such a false label, or any inscription with the same meaning, will be ineligible to receive any contract or subcontract using funds made available in the Act, pursuant to the debarment, suspension, and ineligibility procedures contained in FAR 9.4.

Interior Act

Section 301. Provides that any publicly funded consulting service contract pursuant to 5 U.S.C. 3109 be limited to those contracts where expenditures are a matter of public record and are available for public inspection, except where otherwise provided by law or Executive order.

Section 302. Prohibits the use of appropriations for any activity or publication/distribution of literature to promote public support or opposition to any legislative proposal on which Congressional action is not complete.

Administrative Provision (unnumbered). Similar to Section 304 of the Energy and Water Act, this section of the Interior Act prohibits the use of funds to prepare, issue, or process procurement documents for programs or projects for which appropriations have not been made.

² See Item IV. User Facilities.

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Legislative Direction - Energy and Water Act

Augmenting Federal Staff. Directs the Department of Energy not to exceed 220 management and operating contractor employees assigned to the Washington metropolitan area for fiscal year 2003, the same ceiling as fiscal year 2002. The reporting requirements shall remain the same.

II. Use of Other Than Competitive Procedures for Management and Operating Contracts, Environmental Remediation or Waste Management Contracts and Extensions

What is the scope of this requirement?

The requirements of Section 301 of the Energy and Water Act apply to M&O contract, or environmental remediation or waste management contract awards in excess of \$100 million in annual funding at a current or former contract site or facility. This provision also affects significant extensions or expansions to existing M&O, environmental remediation, or waste management contracts (except as noted below) that are awarded using funds appropriated in the Act without providing for full and open competition in accordance with the policies and procedures set forth at DEAR 917.602(b) and FAR Subpart 6.3. Section 301 and the guidance set forth herein, do not apply to the exercise of an option in accordance with DEAR 970.1706-1.

What procedures need to be followed to implement this requirement?

The justification and Secretarial authorization required by DEAR 917.602(b) will address and satisfy the Secretarial authorization requirements of Section 301 of the Energy and Water Act for M&O, or environmental remediation, or waste management contracts and extensions that are awarded without using competitive procedures.

The Office of Contract Management will prepare the Secretarial notification to Congress and will coordinate its approval and signature by the Secretary for all of DOE (until such time as NNSA designates an Office to prepare and coordinate its notifications). The written notification to the Subcommittees on Energy and Water Development of the Committees on Appropriations of the House of Representatives and the Senate will be provided as soon as practicable following the Secretarial authorization required by DEAR 917.602(b), but not later than 30 days after a waiver has been authorized.

III. Preparation and Issuance of Procurement Documents For Unfunded Programs

What is the scope of this requirement?

The requirement of Section 304 of the Energy and Water Act and the unnumbered administrative provision contained in the Interior Act apply to Departmental initiatives for a program or project that has not been funded by Congress:

- ◆ Section 304 of the Energy and Water Act requires that funds appropriated by the Act shall not be used to prepare or initiate RFPs for a program if the program has not been funded.
- ◆ The unnumbered administrative provision of the Interior Act prohibits the use of funds to prepare, issue, or process procurement documents for programs or projects for which appropriations have not been made.

What procedures need to be followed to implement these requirements?

- ◆ For programs funded by the Energy and Water Act, contracting activities shall not prepare or initiate RFPs, in support of a program or project for which funds have not been appropriated.
- ◆ For programs funded by the Interior Act, contracting activities shall not prepare, issue, or process procurement documents in support of a program or project for which funds have not been appropriated.

Energy and Water Act (Programs)

Energy Supply
Non-Defense Environmental Management
Uranium Facilities Maintenance and Remediation
Science
Nuclear Waste Disposal
Departmental Administration
Office of Inspector General
Power Marketing Administrations
Federal Energy Regulatory Commission
National Nuclear Security Administration
Defense Environmental Management
Defense Nuclear Waste Disposal
Energy Security and Assurance

Interior Act (Programs)

Naval Petroleum and Oil Shale
Reserves
Elk Hills School Lands Fund
Strategic Petroleum Reserve
Clean Coal Technology
Economic Regulation
Energy Information
Administration
Energy Conservation
Fossil Energy Research &
Development

Energy and Water Act (Programs cont.)

Security
Intelligence
Counterintelligence
Independent Oversight and Performance Assurance
Environmental, Safety and Health
Worker and Community Transition
Hearing and Appeals

IV. User Facilities

What is the scope of this requirement?

There are three circumstances under which Departmental processes are affected by Section 307:

- ◆ The first circumstance is where the Department or its management and operating (M&O) contractor makes a user facility available to universities and other potential users;
- ◆ The second is where the Department seeks advice or information from universities or other potential users on the significant characteristics or equipment to be used in a user facility or a proposed user facility; and
- ◆ The third instance is where the Department seeks to create a formal partnership with a university or other potential user for the establishment or operation of a user facility. This can occur in two ways: (1) the Department seeks to enter into a formal partnership with a private party to establish or operate a user facility; or (2) a DOE contractor responsible for the management and operation of a DOE user facility seeks to enter into a formal partnership with a university or other potential user to establish or operate a user facility.

Note: Normally, neither DOE nor its M&O contractors enter into formal partnerships for the management or operation of DOE user facilities. Rather, the operation of these facilities is accomplished under contractual service arrangements, which do not contain legal indicia of a formal partnership. Accordingly, it is not anticipated that this circumstance will arise.

What procedures need to be followed to implement this requirement?

In the first two circumstances as noted on the previous page, DOE should assure that the activities are conducted in a manner that promotes broad participation by all potential scientific and technical users of the facility. The DOE or contractor program element with responsibility for a user facility should ensure that broad public notice of these two activities is provided through publication in the Federal Register or FedBizOps, in addition to relevant scientific journals.

The third circumstance requires that any formal partnership between DOE, its M&O contractor, and a private party for the establishment or operation of a user facility be accomplished through a selection process based on "full and open competition"³.

Contracting officers should assure that, in the unlikely event that DOE or its M&O contractor seeks to establish a formal partnership for the establishment or operation a user facility, the competition requirements conform to this AL.

³ Section 307 uses the phrase "full and open competition." That phrase is a term of art in the Government procurement process. Where DOE is not awarding a contract creating a formal partnership, but instead is using a financial assistance instrument or allowing an M&O contractor to subcontract in creating a formal partnership, a broad public announcement of the opportunity being open to all will satisfy the statute.

V. Lobbying Restrictions

What is the scope of this requirement?

Section 501 of the Energy and Water Act, and Section 302 of the Interior Act apply to all solicitations and awards of DOE contracts under which funds appropriated in either Act are obligated.

What procedures need to be followed to implement this requirement?

The following clause shall be incorporated into solicitations and awards of contracts where the expenditure of funds is made available under the Energy and Water Act:

Lobbying Restriction (Energy and Water Development Appropriations Act, 2003)

The contractor agrees that none of the funds obligated on this award shall be expended, directly or indirectly, to influence congressional action on any legislation or appropriation matters pending before Congress, other than to communicate to Members of Congress as described in 18 U.S.C. 1913. This restriction is in addition to those prescribed elsewhere in statute and regulation.

(End of Clause)

The following clause shall be incorporated into solicitations and awards of DOE contracts where the expenditure of funds is made available in the Interior Act:

Lobbying Restriction (Department of Interior and Related Agencies Appropriations Act, 2003)

The contractor agrees that none of the funds obligated on this award shall be made available for any activity of the publication or distribution of literature that in any way tends to promote public support or opposition to any legislative proposal on which Congressional action is not complete. This restriction is in addition to those prescribed elsewhere in statute and regulation.

(End of Clause)

VI. Purchase of American-Made Equipment and Products-Sense of Congress

What is the scope of this requirement?

Section 502, paragraphs (a) and (b) of the Energy and Water Act apply to all solicitations and awards of contracts using funds appropriated in the Act.

What procedures need to be followed to implement this requirement?

The following notice shall be incorporated into solicitations and awards of contracts using funds appropriated in the Energy and Water Act.

Notice Regarding the Purchase of American-Made Equipment and Products-Sense of Congress.

It is the sense of the Congress that, to the greatest extent practicable, all equipment and products purchased with funds made available under this award should be American -Made.

(End of Notice)

VII. Prohibition of Contracts with Persons Falsely Labeling Products as Made in America

What is the scope of this requirement?

Section 502, paragraph (c), of the Energy and Water Act, applies to all contracts, and subcontracts, under which funds are appropriated in this Act and obligated.

What procedures need to be followed to implement this requirement?

Pursuant to FAR 9.405(b), awards shall not be made to entities that are included on the List of Parties Excluded from Federal Procurement and Nonprocurement Programs.

If DOE, or contractor personnel become aware of possible violation of the prohibition against falsely mislabeling products as made in America, and the entity is not on the List of Parties Excluded from Federal Procurement and Nonprocurement Programs, the matter should be promptly reported through the DOE contracting officer. The report of an entity in violation of the prohibition against falsely mislabeling products as American-Made

should be submitted to the Office of Management Systems, Office of Procurement and Assistance Management, for potential debarment of the entity pursuant to FAR 9.406-2(a)(4) and 9.406-2(b)(1)(iii). For NNSA contracts, the Office of Management Systems will coordinate its activities with the NNSA office of Procurement and Assistance Management.

VIII. Legislative Direction - Energy and Water

Augmenting Federal Staff

What is the scope of this requirement?

The Department is to provide a report on the use of M&O contractor employees assigned to the Washington metropolitan area. The report is to include detailed information for each support service contract at Headquarters. The committee agrees that the number of M&O contractor employees assigned to the Washington metropolitan area shall not exceed 220.

What procedures need to be followed to implement this requirement?

Controls for the use of facility contractor employees for services in the Washington metropolitan area are established in DOE Order 350.2, "Use of Facility Contractor Employees for Services to DOE in the Washington, D. C. Area." The Headquarters Office of Contract Management is responsible for preparation and submission of the report to Committee. While support service contract ceilings were discontinued, the use of such contracts will continue to be monitored respectively by the DOE and NNSA Office of Procurement and Assistance Management. The Director, Office of Procurement and Assistance Management for NNSA will provide information resulting from its monitoring to the Headquarters Office of Contract Management.